TATALAAN PLANTATION SDN BHD & ANOR v. BARAHIM ANDIPOH & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
LEONARD DAVID SHIM J
[SUIT NO: BKI-22NCvC-28-3-2019]
20 APRIL 2023

Abstract – *If a contracting party does not have the capacity to enter into an agreement, then the entire agreement could not be enforced legally and the agreement would be ineffectual in granting the other party any rights or interests.*

TRUSTS: *Trust property – Beneficiaries – Joint venture agreement and logging agreement – Whether beneficiaries had any authority, rights or capacity to enter into agreements – Whether beneficiaries able to enter into any agreement to grant any interest or rights over land – Land title contained special terms – Whether special terms had to be complied with – Whether there were conditions precedent to agreements becoming valid, binding, of legal effect and enforceable*

CONTRACT: *Agreement – Joint venture agreement and logging agreement – Land title contained special terms – Whether special terms had to be complied with – Whether there were conditions precedent to agreements becoming valid, binding, of legal effect and enforceable – Whether there was breach of contract – Contracts Act 1950, s. 33*

This was a trial on preliminary issues under O. 33 r. 2 of the Rules of Court 2012. One Barahim Andipoh and all 812 others (collectively referred to as 'first defendant') were the beneficiaries of a land in Kampung Tatalaan 2, Nabawan, Sabah. The sixth defendant, as the trustee for the beneficiaries, was the registered owner of the land. The plaintiffs had entered into a joint venture agreement ('JVA') and the logging agreement ('LA') with some of the beneficiaries. The JVA and the LA signed by the plaintiffs, however, were not signed or entered into with the fifth, sixth or seventh defendants. Further, the fourth, fifth, sixth or seventh defendant had not given any consent and/or permission to: (i) the plaintiffs to enter the JVA or the LA and to enter, use or occupy the land nor for the plaintiffs to enter into any dealings with the beneficiaries; and (ii) the second defendant to enter and carry out land clearing works on the land. It was also undisputed that the beneficiaries of the land were to comply with the special terms contained in the land title including the following: (i) the Collector shall act as the trustee of the land for the beneficiaries; (ii) the Collector shall abide with the directions of the Director of Lands and Surveys ('director') who shall solely determine the terms for the administration of the trust; (iii) the beneficiaries shall at all times comply with the directions of the Collector in relation to the use and

occupation of the land; (iv) no dealings by the beneficiaries of their interest shall be recognised unless and until approved by the director; and (v) no beneficiaries or other persons shall have any caveatable interest over the land. The preliminary issues for trial were: (i) did the beneficiaries of the said land, collectively or individually, have any authority, rights or capacity to enter into the JVA or the LA with the plaintiffs; (ii) did the special terms in the title deed to the land have to be complied with before the JVA and the LA becomes valid, binding, of legal effect and enforceable. If so, were the special terms complied with; (iii) were there any conditions precedent to the JVA and the LA becoming valid, binding, of legal effect and enforceable. If so, have the conditions precedent been complied with; (iv) were the JVA and/or the LA valid, binding, of legal effect and enforceable; and (v) if the JVA and the LA were not valid, binding or enforceable and of no legal effect, do the plaintiffs have any cause of action against the defendants.

Held (dismissing claim):

(1) Under the law, it is trite that beneficiaries under a trust have no capacity, authority or rights to enter into agreements in respect of trust property. Based on the special terms contained in the title to the land, only the director could make decisions relating to the land. Even the Collector had to abide with the directions and the decisions of the director. The special terms were also explicit in that the beneficiaries shall, at all times, comply with the directions of the Collector in relation to the use and occupation of the land. In this case, neither the Collector nor the director had given their approval for any beneficiaries to enter into the JVA and the LA. Clearly, the beneficiaries had no rights to decide on the use or occupation of the land. The beneficiaries (including the first defendant) had no interest or rights to the land without the approval of the director. They were not able to enter into any agreement to grant any interest or rights over the land, which they themselves did not have, to the plaintiffs. In other words, the first defendant and the beneficiaries had no capacity to enter into contract in respect of the land. The agreements entered by the beneficiaries (first defendant) was void for lack of capacity. (paras 26, 28, 44 & 46)

(2) There were conditions precedent for the JVA and the LA becoming valid, binding, of legal effect and enforceable, *ie,* the approval from the director must be obtained first before the appointment of the plaintiff as the contractors in the land. Besides, it was also a condition precedent that the JVA would only be enforceable, valid, binding and have legal effect if 100% of the beneficiaries signed the said JVA. It was not disputed that some of the beneficiaries did not sign the JVA or the LA with the plaintiffs. The plaintiffs failed to fulfil the conditions precedent contained in the JVA and the LA and therefore, both the JVA and the

LA were invalid, not binding, had no legal effect and was unenforceable. Section 33 of the Contracts Act 1950 would thus apply. (paras 84, 104 & 105)

(3) There was no valid or enforceable contract. Hence, the plaintiffs had no cause of action against the second to seventh defendants for inducing a breach of contract or interfering with the contract. Neither did the plaintiffs have any cause of action against the first defendant. (para 121)

Case(s) referred to:

Amanah Raya Bhd v. Ong Chin Hoo [2019] 6 CLJ 41 CA ***(refd)***
Chor Phaik Har v. Farlim Properties Sdn Bhd [1997] 4 CLJ 393 FC ***(refd)***
CME Group Bhd v. Bellajade Sdn Bhd & Another Appeal [2018] 10 CLJ 147 FC ***(refd)***
Eastham v. Leigh London And Provincial Properties Ltd [1971] 1 Ch 871 ***(refd)***
Egin & Ors v. Corak Nakhoda Sdn Bhd & Ors [2009] 1 LNS 1516 HC ***(refd)***
Federal Insurance Co v. Nakano Singapore (Pte) Ltd [1992] 1 SLR 390 ***(refd)***
Gula Perak Bhd v. Datuk Lim Sue Beng & Other Appeals [2019] 1 CLJ 153 FC ***(refd)***
GPQ Sdn Bhd v. Constant View Sdn Bhd [2017] 1 LNS 821 CA ***(refd)***
Grieg v. Insole [1978] 1 WLR 302 ***(refd)***
Ho Kok Cheong Sdn Bhd & Anor v. Lim Kay Tiong & Ors [1979] 1 LNS 29 FC ***(refd)***
Huang Ee Hoe v. Tiong Thai King [1991] 1 CLJ 381; [1991] 2 CLJ (Rep) 745 HC ***(refd)***
In-Comix Food Industries Sdn Bhd v. A Clouet & Co (KL) Sdn Bhd [1996] 2 BLJ 543 HC ***(refd)***
Khatijah Abdullah & Ors v. Mohd Isa Biran [2017] 7 CLJ 513 FC ***(refd)***
Lean Shing Pek v. Anang Basang & Ors [2013] 8 MLJ 899 ***(refd)***
Lee Ah Thaw v. Lee Chung Tek [1978] 1 MLJ 173b ***(refd)***
Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 FC ***(refd)***
National Land Finance Co-Operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(refd)***
Network Pet Products (M) Sdn Bhd v. Royal Canin SAS & Anor [2015] 2 CLJ 530 CA ***(refd)***
Ng Siew Wah & Ors v. MAA Holdings Sdn Bhd & Anor [1985] 1 LNS 37 FC ***(refd)***
Punca Klasik Sdn Bhd v. All Persons In Occupation Of The Wooden House Erected On A Portion Of Land Held Under Grant No 26977 For Lot 4271 In The Township Of Johor Bahru, Johor & Another Case [1995] 4 BLJ 337 HC ***(refd)***
Raja Segaran S Krishnan v. Bar Council Malaysia & Ors (No 2) [2001] 1 CLJ 680 HC ***(refd)***
Rira Bina Sdn Bhd v. GBC Construction Sdn Bhd [2011] 2 CLJ 653 HC ***(refd)***
Savant-Asia Sdn Bhd v. Sunway PMI-Pile Construction Sdn Bhd [2008] 6 CLJ 681 FC ***(refd)***
Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1979] 1 LNS 96 FC ***(refd)***
Toh Huat Khay v. Lim A Chang [2010] 7 CLJ 261 FC ***(refd)***
Trans Trust SPRL v. Danubial Trading Co Ltd [1952] 2 QB 297 ***(refd)***
Yeoh Cheng Han & Anor v. PPH Resorts (Penang) Sdn Bhd [2010] 1 LNS 1308 HC ***(refd)***
Yeoh Tiong Lay & Sons Holdings Sdn Bhd v. Annavi Mookan & Anor And Dekor Panel Emas Sdn Bhd (Intervener) [1994] 3 CLJ 265 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 24(a), (b), (e), 33
Forest Enactment 1968, s. 24(5)
Land Ordinance (Sabah) (Cap 68), ss. 4, 23, 76, 77
Rules of Court 2012, O. 14A r. 1, O. 33 rr. 2, 5

For the plaintiffs - Lawrence Thien & Valerie Lim; M/s Chau & Thien
For the 1st defendant - Sonny Durai; M/s Allion Kitingan & Partners
For the 2nd defendant - Chung Jiun Dau; M/s Chung & Assocs
For the 3rd-7th defendants - Devina Teo; Jabatan Peguam Besar, Sabah

Reported by Lina E

JUDGMENT

Leonard David Shim J:

Introduction

[1] This is a trial on preliminary issues under O. 33 r. 2 of the ROC 2012 which have been agreed by all parties. The agreed facts and preliminary issues for trial are as follows:

Agreed Facts

(i) Barahim bin Andipoh (hereinafter referred to as "Barahim") and all 812 others (collectively referred to as the first defendant) are the beneficiaries of the Communal Title Field Register No. 154000683 situated at Kampung Tatalaan 2, in the District of Nabawan, Sabah (hereinafter referred to as "the said land");

(ii) the title deed to the said land is found at encl. 222 at pp. 6 to 34 and contains special terms as stated in the title deed;

(iii) the sixth defendant as trustee for the beneficiaries is the registered owner of the said land;

(iv) the joint venture agreement and the logging agreement both dated 23 May 2018 entered into by the plaintiffs are found at encl. 222 at pp. 44 to 69 and at pp. 89 to 101;

(v) some of the beneficiaries to the said land had passed away prior to the plaintiffs entering into the joint venture agreement and the logging agreement both dated 23 May 2018;

(vi) not all the beneficiaries had entered into the joint venture agreement and the logging agreement both dated 23 May 2018 with the plaintiffs;

(vii) some of the beneficiaries had received the Wang Ehsan from the plaintiff as per the payment vouchers shown in PSBOD No. 2 (encl. no. 306);

(viii) the joint venture agreement and the logging agreement both dated 23 May 2018 signed by the plaintiffs were not signed or entered into with the fifth, sixth or seventh defendants;

(ix) the fourth, fifth, sixth or seventh defendants have not given any consent and/or permission to the joint venture agreement or the logging agreement to be entered into with the plaintiffs;

(x) the fourth, fifth, sixth or seventh defendants have not given any consent or permission to the plaintiffs for the plaintiffs to enter, use or occupy the said land nor for the plaintiffs to enter into any dealings with the beneficiaries;

(xi) the plaintiffs have not obtained any timber or forest licences in respect of the said land; and

(xii) the fourth, fifth, sixth and seventh defendants have given consent and/or permissions to the second defendant to enter and carry out land clearing works on the said land.

[2] It is also undisputed that pursuant to the land title, the beneficiaries of the said land are to comply with the special terms contained in the land title including the following:

(i) the Collector shall act as trustee of the said land for the beneficiaries;

(ii) the Collector shall abide with the directions of the Director of Lands and Surveys who shall solely determine the terms for the administration of the trust;

(iii) the beneficiaries shall at all times comply with the directions of the collector in relation to the use and occupation of the land;

(iv) no dealings by the beneficiaries of their interest shall be recognised unless and until approved by the Director of Lands and Surveys; and

(v) no beneficiary or other person shall have any caveatable interest over the land preliminary issues for trial.

[3] The preliminary issues for trial are as follows:

(i) do the beneficiaries of the said land, collectively or individually, have any authority, rights or capacity to enter into the joint venture agreement or the logging agreement with the plaintiffs?

(ii) do the special terms in the title deed to the said land have to be complied with before the joint venture agreement and the logging agreement becomes valid, binding, of legal effect and enforceable? If so, were the special terms complied with?

(iii) are there any condition precedents to the joint venture agreement and the logging agreement becoming valid, binding, of legal effect and enforceable? If so, have the condition precedents been complied with?

(iv) are the joint venture agreement and/or the logging agreement valid, binding, of legal effect and enforceable? and

(v) if the joint venture agreement and the logging agreement are not valid or binding or enforceable and of no legal effect, do the plaintiffs have any cause of action against the defendants?

Law On O. 33 r. 2 Of The Rules Of Court 2012

[4] Order 33 r. 2 provides the court with the discretionary power to order a question or issue upon which the cause or matter turns to be tried before, at or after the trial.

[5] Malaysian Rules of Court 2012 (An Annotation) has the following commentaries:

(i) this rule is intended to save costs and time in circumstances resolving an issue as a preliminary question of law or fact is likely to have the effect of substantially disposing of the cause or matter, *ie*, 'for determination of a preliminary point in one way may make it unnecessary for other more complex issues of fact or law to be decided, thus resulting in a saving of time and expense of a protracted trial on those issues': *Federal Insurance Co v. Nakano Singapore (Pte) Ltd* [1992] 1 SLR 390 at 294, CA (Sing), per Chan Sek Keong K, or rendering the trial of the cause of matter unnecessary;

(ii) in determining whether an order should be made, the court has to consider whether the question of law of fact is significant to substantially dispose of the matter altogether. See *Huang Ee Hoe v. Tiong Thai King* [1991] 1 CLJ 381; [1991] 2 CLJ (Rep) 745; [1991] 1 MLJ 51;

(iii) in *Savant-Asia Sdn Bhd v. Sunway PMI-Pile Construction Sdn Bhd* [2008] 6 CLJ 681; [2009] 5 MLJ 754, the appellant applied under RHC O. 14A and/or O. 33 rr. 2 and 5 for the issue of absolute/qualified privilege raised in the pleading to be tried as a preliminary issue. The Federal Court held that this was a fit and proper case to be decided under RHC O. 14A. The outcome of the respondent's claim rested entirely on the answer to the question posed which purely involved the application of the facts, which were not in dispute, to the relevant provisions of the Companies Act 1965 (Act 125) and the Companies (Winding-up Rules) 1972 (PU(A) 289/1972). The claim could appropriately be disposed of under O. 14A;

(iv) in *Yeoh Cheng Han & Anor v. PPH Resorts (Penang) Sdn Bhd* [2010] 1 LNS 1308; [2011] 2 AMR 175, the plaintiffs filed an application under RHC O. 14A and/or under RHC O. 33(2) for the action to be determined based on the pleadings and affidavits filed in support. The main issue to be determined, which would essentially determine all the other issues in the case, was whether the defendant was a housing developer under the Housing Development (Control and Licensing) Act 1966 (Act 118); and

(v) on the desirability of conducting the trial of preliminary question at an early stage in the proceedings, see *dicta* of Chong Siew Fai J (as His Lordship then was) in *Huang Ee Hoe* (*supra*):

> … it was urged upon me that if the application (for trial of preliminary issues in a derivative action were to be allowed, the preliminary issues to be dealt with at the commencement at the trial of this action. I am unable to accept this. Leaving the issues for disposal at the commencement of trial of the main action necessarily means that all are set for the trial including the subpoena and presence or attendance or witnesses of both sides in participation of the trial to proceed. On the other hand, if the preliminary issues are disposed of in advance, preparatory works for the trial as aforesaid may or may not be necessary dependent upon the result of the present application. An early disposal of the present application would undoubtedly place parties in a clearer position as to whether anything needs to be done in the conduct of the case, and is, in my opinion, to be preferred.

[6] Malaysian Rules of Court 2012 (An Annotation) para. 33/5/2 reads:

Dismissal of cause or matter:

(i) under RHC O. 14A r. 1 and RHC O. 33 r. 5, the court has wide powers to judgment in the matter, including a counterclaim. See: *Rira Bina Sdn Bhd v. GBC Construction Sdn Bhd* [2011] 2 CLJ 653;

(ii) the court has to first determine the issue which substantially disposes of the cause or matter or renders the trial unnecessary. Once determined, r. 5 empowers the court to dispose of the cause or matter. See *Raja Segaran S Krishnan v. Bar Council Malaysia & Ors (No 2)* [2001] 1 CLJ 680; [2001] 1 MLJ 472;

(iii) where a point of law raised on the pleadings is set down for disposal, the action may be dismissed forthwith in which case no motion for judgment is required;

(iv) the RHC O. 14A provides for an accelerated final disposal of an action at an interlocutory stage. This is to save time and expense which would otherwise arise if the action were to proceed to full trial. It empowers the court to make a final determination of a question of law without the need of an application under RHC O. 33 r. 2 for the determination of a preliminary issue. (See: *Savant Asia Sdn Bhd* (*supra*)).

[7] Having considered the pleadings, agreed facts and preliminary issues for trial, the court is satisfied that the preliminary issues in encl. 332 will have the effect of substantially disposing the cause or matter and render the trial unnecessary.

Preliminary Issue No. (i)

Do The Beneficiaries Of The Said Land, Collectively Or Individually, Have Any Authority, Rights Or Capacity To Enter Into The Joint Venture Agreement Or The Logging Agreement With The Plaintiffs?

[8] In respect of preliminary issue no. (i), the plaintiffs submit that the said land has been alienated to the beneficiaries of the said land who are the ultimate owners and have beneficial interests and rights in the said land which are distinct and separate from the rights of the Collector as trustee.

[9] It is submitted by the plaintiffs that the present case deals with communal title, and therefore the meaning of beneficiary or beneficiaries as per stated in the communal title ought to be understood as the natives of Sabah in respect of communal titles under s. 76 and the sub-division of communal title in s. 77 of the Land Ordinance (Sabah) (Cap. 68).

[10] The statutory provisions governing the said land are s. 4, s. 76 and s. 77 of the Land Ordinance (Sabah) (Cap. 68). They are reproduced here for ease of reference:

Section 4 of the Land Ordinance (Sabah) (Cap. 68) interprets 'dealing' as follows:

> 4. In this Ordinance, the following terms shall, if not inconsistent with the context or subject matter, have the respective meanings hereby assigned to them:
>
> …
>
> "dealing" means any transaction of whatever nature by which land is affected under this Ordinance;

Section 76 of the Land Ordinance (Sabah) (Cap. 68) which is the provision for communal title states the following:

> 76. In cases where any State land planned by the Government for the natives of Sabah or a claim to customary tenure of land has been established or a claim to native customary rights has been dealt with by a grant of land and such land is to be held or is held for the common use and benefit of natives and is not assigned to any individual as his private property, it shall be lawful for the Minister to sanction a communal native title for such land to be issued in accordance with the relevant provisions of this Ordinance in the name of the Collector as trustee for the natives concerned but without power of sale and such communal native title shall be held to be a title under this Part, but shall be subject to such rent as the Minister may order.

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77. A communal title may, with the sanction of the Collector, be sub-divided and wholly or in part assigned to individual owners, who shall thereupon receive native titles in their own names. In such cases it shall be lawful for the Collector to sign a transfer on behalf of the community.

[11] In the communal title in this matter, the term dealing is as follows:

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No dealings by the beneficiaries of their interest shall be recognized unless and until approved by the director of lands and surveys and no beneficiary or other person shall have any caveatable interest over the said land save in respect of an interest claimed by the Government.

[12] The word 'dealing' appear, *inter alia*, in ss. 88 and 89 of the Land C Ordinance. The plaintiffs submit that the interpretation of "dealing" in s. 4 hereinabove has a very wide interpretation and can cover any types of transaction including agreements, *ie*, joint venture agreement and logging agreement in the present case.

[13] Dealing in this title term must bear the same interpretation as in s. 4 D of the Land Ordinance since the communal title is issued in accordance with s. 76 of the Land Ordinance.

[14] Under s. 76 of the Land Ordinance, the communal title is planned by the Government for the natives of Sabah or where native customary rights have been established and to be held for the common use and benefit of the E natives concerned. The only restriction is that the natives have no power of sale.

[15] In the present suit, the applicants and the beneficiaries of the said land entered into a dealing, *ie*, a joint venture agreement and a logging agreement F with the plaintiffs which sets out the terms and conditions in particular, payment to the beneficiaries on the sale of timber cleared from the said land.

[16] The term 'dealing' in the title presupposes that the beneficiaries can first have dealings (transaction with third parties) and get such dealing approved by the Director of Lands and Surveys later on. Such is the case in G the present suit.

[17] Further, the plaintiffs contend that the ACLR had supported the beneficiaries' intention and agreement. Therefore, the plaintiffs submit that pending the approval from the Director of Lands and Surveys, the agreements are valid being allowed by the terms in the communal title and H is not in breach of any of the special terms.

[18] The plaintiffs submit that the Collector is only acting as a trustee for the beneficiaries of the said land and to ensure that the beneficiaries will be beneficiaries from the sub-division of the said land and is not the legal owner of the said land. The trustee must manage and act in the best interests of the I beneficiaries of the trust and the ownership of the said land (which will be converted eventually into individual titles to the beneficiaries under s. 77 of the Land Ordinance) remains with the beneficiaries.

[19] The plaintiffs further submit that the dealing (the joint venture agreement and logging agreement) has to form a basis for an application for approval from the Director of Lands and Surveys.

[20] The dealing in the form of the agreements has to be entered into between the beneficiaries and the plaintiffs (who are the developer and contractor) first to form a basis to apply to the Director of Lands and Surveys for approval.

[21] In the premises, the plaintiffs submit that the beneficiaries of the said land collectively or individually, have the authority, rights and capacity to enter into the joint venture agreement and the logging agreement with the plaintiffs.

[22] Learned counsels for the defendants filed separate submissions which took a common stand on all the preliminary issues for trial.

[23] In the instant case, the sixth defendant (the Collector) is the registered owner of the said land as trustee: see encl. 222 at pp. 6 to 34 for the title deed.

[24] There are 813 named individual beneficiaries under title deed to the said land and they are grouped into 475 groups and the title deed indicates that each group will be obtaining more or less ten acres once individual titles are subdivided and transferred to the groups of beneficiaries.

[25] For completeness, it should be noted that the individual beneficiaries are not the only beneficiaries to the said land. The entire area of the said land is around 8,719 acres (3,530 hectares x 2.47). The 475 groups of individual beneficiaries will be collectively given a total of around 4,750 acres (475 x ten acres) through the issuance of subdivided titles. The remaining 3,969 acres of the said land will be going to the seventh defendant (the State Government of Sabah). The defendants contend that in effect, the seventh defendant is also a "beneficiary" insofar as the said land is concerned.

[26] Under the law, it is trite that beneficiaries under a trust have no capacity, authority or rights to enter into agreements in respect of trust property.

[27] The land held under Communal Title Field Registry No. 154000683 contains special terms including that:

(i) the Collector shall act as trustee of the land for the beneficiaries;

(ii) the Collector shall abide with the directions and decisions of the Director of Lands and Surveys who shall solely determine the terms for the administration of the trust;

(iii) the beneficiaries shall at all times comply with the directions of the Collector in relation to the use and occupation of the land; and

(iv) no dealings by the beneficiaries of their interest shall be recognised unless and until approved by the Director of Lands and Surveys.

Neither the Collector nor the Director of Lands and Surveys had given their approval for any beneficiaries to enter into the joint venture agreement dated 23 May 2018 and the logging agreement dated 23 May 2018.

[28] Based on the special terms contained in the title to the land, only the Director of Lands and Surveys can make decisions relating to the land. Even the Collector has to abide with the directions and decisions of the Director of Lands and Surveys. The special terms are also explicit in that the beneficiaries shall at all times comply with the directions of the Collector in relation to the use and occupation of the land. Clearly, the beneficiaries have no rights to decide on the use or occupation of the land.

[29] The special terms make it explicitly clear that the beneficiaries have no rights to determine or decide on use or occupation of the land and must comply with the directions of the Collector (who is the legal owner of the land). The special terms also make clear that the beneficiaries cannot even have any dealings in respect of their beneficial interest in the land unless and until it is approved by the Director of Lands and Surveys and such dealings will not be recognised without such approval. This clearly means that the beneficiaries have no right to enter into dealings or agreements without the prior approval of the Director of Lands and Surveys.

[30] The special terms make it even clearer by stating explicitly that no beneficiary shall have any caveatable interest over the land. If the beneficiaries do not have a caveatable interest in the land, then they cannot grant any interest or rights to the plaintiffs. Hence, the special terms make clear that the beneficiaries have no rights to grant any rights in respect of use and occupation of the land (even in respect of their beneficial interests), the beneficiaries have no right to enter into dealings or agreements without the prior approval of the Director of Lands and Surveys.

[31] Further, s. 23 of the Land Ordinance makes clear that even a registered owner of land does not have the right to extract or remove timber from land (unless the title contains express provision to the contrary).

[32] The extraction of timber from land requires a licence issued under s. 24 of the Forest Enactment 1968. Section 24(5) of the Forest Enactment 1968 provides that:

> No licence shall be issued for the doing of any act on alienated land except on application by, or with the written permission of, the owner of lessee of such land.

[33] In the instant case, the owner is the Collector as trustee. There is no dispute that the Collector (whether through the direction or decision of the Director of Lands and Surveys or otherwise) did not give any consent to the plaintiffs or the beneficiaries to conduct any logging activities on the land or to apply for a timber licence under s. 24 of the Forest Enactment 1968.

[34] Even under the general law, agreements in respect of trust property are to be entered into by the trustee and not the beneficiaries. For example, beneficiaries in an intestate estate where the administration is incomplete, has been held by the Federal Court to have no caveatable interest in the lands belonging to the estate: see *Lee Ah Thaw v. Lee Chung Tek* [1978] 1 MLJ 173b and *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1997] 4 CLJ 393; [1997] 3 MLJ 188.

[35] The situation of beneficiaries in an intestate estate where the administration is incomplete is analogous to the situation of the beneficiaries in the present case. In an intestate estate, the executor is the trustee of the property of the estate whilst in the present case, the trustee is the Collector (as stated in the title to the land).

[36] In *Lee Ah Thaw v. Lee Chung Tek* [1978] 1 MLJ 173b at 176, the Federal Court held that the "testator's property was vested in his executor for the purpose of administration of his estate and no one else has any property interest on such property".

[37] Similarly in *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1997] 3 MLJ 188 at 196, the Federal Court held that:

> in law, a beneficiary under an intestacy has no interest or administration of the latter's estate is complete and distribution made according to the law of distribution of the intestate estate.

[38] In the present case, the special terms in the title deed to the land, reinforces and make clear that the beneficiaries also has no interest or property in the land by stating that the beneficiaries have no caveatable interest.

[39] In *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1997] 4 CLJ 393; [1997] 3 MLJ 188 at p. 404 (CLJ); p. 197 (MLJ), the Federal Court concluded that:

> Having regard to the above observation and the circumstances of the whole case, we are satisfied that at the date of the execution of the sale agreements, the administration of the estate of Chor Bah Say has not been completed. It follows that until his estate has been fully administered by the administrators and distribution made according to law, the beneficiaries have no interest or property in the estate of Chor Bah Say so as to give them any title to the lands. Here, we agree with counsel for the appellant that the beneficiaries of his estate, being vendors of the lands under the sale agreements could not have covenanted to convey

any title to the respondents. In the result, the respondents cannot rely on the sale agreements to justify their status as 'person aggrieved' under s. 327 of the Code.

[40] This principle is not merely applicable to an intestacy estate but in any situation where there is a trust. The case of *Yeoh Tiong Lay & Sons Holdings Sdn Bhd v. Annavi Mookan & Anor And Dekor Panel Emas Sdn Bhd (Intervener)* [1994] 3 CLJ 265 involved a parcel of land which was held under an irrevocable trust by the registered proprietors as trustee. There had been a trust deed executed between the trustee and the 37 beneficiaries. Shankar J (as he then was) held that (at p. 271):

> In these circumstances who had the power to sell the said land? It is trite law that only the legal owner or the registered proprietor has the power to sell - not one or more beneficiaries under the trust, anymore than a shareholder in a company or one of the next of kin in a deceased estate can enter into a valid contract to sell the assets of the company or the estate of the deceased. Even if all such beneficiaries entered into such a contract that contract would be void for the mere reason that the beneficiaries have no vested legal right to the said land. They have no capacity to contract any valid sale. Only the trustees being the legal owners can contract.

[41] Shankar J (as he then was) went on to state that (at p. 271):

> Under the law of trusts and our Trustees Act 1949 as now constituted, it is the opinion of this Court that such a trust can only be put to an end, by a proper order of the High Court; which would be imperative if the trustees object. It is only after the trust has been terminated and the property transferred to the beneficiaries, that the legal and beneficial interests in the said land, would vest in the beneficiaries so as to give them a capacity to make an enforceable contract of sale.

[42] The effect of an agreement which has been entered into by someone without capacity means that the agreement is not enforceable legally. In *Punca Klasik Sdn Bhd v. All Persons In Occupation Of The Wooden House Erected On A Portion Of Land Held Under Grant No 26977 For Lot 4271 In The Township Of Johor Bahru, Johor & Another Case* [1995] 4 BLJ 337; [1996] 5 MLJ 92 at pp. 350 to 351 (BLJ); pp. 110 to 111 (MLJ), Abdul Malik Ishak J (as he then was) stated:

> In so far as exhs NEH1, NEH2, NEH3 and NEH4 are concerned, the same germane observations made in regard to the agreement of sale entered between Lim's father and Syed Ali would apply and for fear of repetition, I need not repeat them here. Suffice for me to say that Syed Abdullah had no legal authority to sell that portion to Ng's father on 27 November 1951 because on that date the whole portion of the land was registered in the name of Estate and Trust Agencies (1927) Ltd. Unlike Syed Ali, Syed Abdullah was never appointed as one of the trustees to the said estate. Just like Lim, Ng too did not acquire a stake on that portion at all.

…

Both Syed Ali and Syed Abdullah were beneficiaries of a trust property and in that capacity they lack authority to enter into a legally enforceable contract to sell that trust property. Only the registered proprietor, and at that material time it was Estate and Trust Agencies (1927) Ltd, who has the authority to sell the land. I am fortified in my view by the passages appearing in the judgment of Mahadev Shankar J (now JCA) in *Yeoh Tiong Lay & Sons Holdings Sdn Bhd v. Annavi s/o Mookan & Anor, Dekor Panel Emas Sdn Bhd (Intervener)* [1994] 3 CLJ 265 …

As stated earlier, from 22 January 1949 to 13 January 1981 the land was registered in the name of Estate and Trust Agencies (1927) Ltd who were the trustees of the said estate. What Syed Ali and Syed Abdullah did cannot be given legal sanctity for three simple reasons:

(1) they were not the registered proprietors;

(2) there was no evidence that the other beneficiaries to the said estate had agreed to the purported sale of those pieces to Lim's father and to Ng's father; and

(3) There was no evidence that the trust instrument has been terminated.

It is indeed unfortunate that Lim's father and Ng's father bought those portions as the agreements as exhibited in the affidavits cannot be enforced legally nor can they pass legal titles or interests to those portions based on those agreements.

[43] In other words, if a contracting party does not have capacity to enter into the agreement, then the entire agreement cannot be enforced legally and the agreement will be ineffectual in granting the other party any rights or interests.

[44] In the present case, the beneficiaries (including the first defendant) have no interest or rights to the land (without the approval of the Director of Lands and Surveys), they are not able to enter into any agreement to grant any interest or rights over the land (which they themselves do not have) to the respondents. In other words, the first defendant and the beneficiaries have no capacity to enter into contract in respect of the land.

[45] In the case of *Amanah Raya Bhd v. Ong Chin Hoo* [2019] 6 CLJ 41; [2020] 3 MLJ 463, it was held that (at p. 57 (CLJ); p. 478 (MLJ)):

[51] … a beneficiary has no title or interest in property in the deceased's estate until the estate has been fully administered and distributed according to the law. Therefore, a beneficiary cannot make any covenant to convey title in the property to other parties.

The Court of Appeal went onto strike out the beneficiary/respondent's claim on the basis of lack of capacity to contract and held that:

A [54] Applying the principle laid down in *Chor Phaik Har* and *Goh Keat Poh*, the vendors in our present case were not entitled to sell their future interest in the properties which they have expected to inherit. They should have waited until the grant of the letters of administration was issued and after the appointed administrator completed the distribution of the properties to them, before executing any sale and purchase agreements in
B respect of the estate properties.

[55] For the reasons cited above we are unable to concur with learned counsel for the respondent that these are contingent contracts, and more importantly that the respondent had the requisite capacity to contract. This is an issue of law that does not require a trial. The position in law
C is trite, namely that letters of administration have to be issued and the property distributed before the beneficiaries can sell the subject land. Therefore, the learned judicial commissioner erred in failing to recognise the primary issue before the court. The net result is that the SPA is null and void for lack of capacity.

D [56] Since we have determined that SPA is void, the plaintiff's action in seeking specific performance of the SPA is obviously unsustainable according to the trite principle enunciated in the Supreme Court case of *Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, which has been applied in numerous other appellate court cases …

E **[46]** In the light of the foregoing reasons and authorities, the court finds that the beneficiaries have no authority, right and capacity to do any dealing in the land unless and until approved by the Director of the Lands and Surveys. The agreements entered by the beneficiaries (first defendant) is void for lack of capacity. Hence, preliminary issue (i) is answered in the negative.

F **Preliminary Issue No. (ii)**

Do The Special Terms In The Title Deed To The Said Land Have To Be Complied With Before The Joint Venture Agreement And The Logging Agreement Becomes Valid, Binding, Of Legal Effect And Enforceable? If So, Were The Special Terms
G *Complied With?*

[47] The plaintiffs submit that the special terms of the title deed to the said land relating to the approval of the Director of Lands and Surveys need not be complied with before the joint venture agreement and logging agreement become valid, binding, of legal effect and enforceable.

H **[48]** The defendants contend that it is mandatory that the permission of the Director of Lands and Surveys must be obtained for the joint venture agreement and the logging agreement to be valid, binding of legal effect and enforceable. This is clearly stated in the special terms of the title deed of the said land.

I

[49] The plaintiffs have acknowledged that the special term in the title deed that the approval of the director must be obtained must be complied. That why this is reflected in the joint venture agreement and remain blank as no approval has been obtained.

[50] Recital D of the joint venture agreement reads:

> Pengarah Tanah dan Ukur Sabah telah memberikan kebenaran kepada Benifisari-Benifisari atau TPSB untuk memsuki, mengurus, mengusaha dan membangukan Kawasan Tanah Tersebut. Surat kebenaran tersebut Rujukan _____ disertakan dan dirujuk di sini sebagai "Lampiran B".
>
> See 1st Defendants Bundle of Documents page 43 D (Enclosure 266).

[51] In essence, Recital D of the joint venture agreement purports to refer to an existing approval by the Director of Lands and Surveys which is purportedly attached to the agreement but the date of the approval by the Director of Lands and Surveys is left blank and there is no Lampiran B attached. This clearly shows that the joint venture agreement is premised on the fact that as at the date of the joint venture agreement, approval had already been granted by the Director of Lands and Surveys. This shows that this approval is a condition precedent to the joint venture agreement becoming binding and of legal effect.

[52] It is undisputed that the plaintiffs have not obtained the permission of the Director of Lands and Surveys to enter the joint venture agreement and the logging agreement with the beneficiaries.

[53] There is no evidence showing that the Director of Lands and Surveys Department had approved any dealing made by the beneficiaries to appoint the plaintiff as the contractor in the said land.

[54] Based on the statement of claim, the plaintiffs claim that the supporting letter from the Penolong Pemungut Hasil Tanah Nabawan (PPHT Nabawan) dated 26 April 2018 is an approval letter that the second plaintiff is the appointed contractor on the said land.

[55] A careful reading of the said letter reveals that it is not an approval letter but rather as a forwarding letter to the Director of Lands and Surveys on the second plaintiff's application as the contractor on the said land. It is not disputed by the plaintiff that the said letter was only received by the Director of Lands and Surveys on or about 16 January 2019. See: pp. 27, 28 to 42 of DBOD 6.

[56] Further and in any event, the evidence shows that the only approval to enter the land was only granted to the second defendant on 22 January 2019. See: pp. 100 to 101 of DBOD6.

[57] Therefore, based on the special terms of the land title, it is mandatory for the beneficiaries to comply with the directions of the Collector in relation to use and occupation of the said land by the beneficiaries and their families and also in all matters relating to rights of way, drainage, irrigation canal, bridges or any other basements and allocation of lots shall determine any lot boundaries disputes. See: p. 2 of DBOD6.

[58] Based on the terms and conditions contained in the land title, only the Director of Lands and Surveys can make decisions relating to the said land. Even the Collector has to abide with the directions and decisions of the Director of Lands and Surveys. The terms are also explicit in that the beneficiaries shall at all times comply with the directions of the Collector in relation to the use and occupation of the said land. Clearly, the beneficiaries have no rights to decide on the use or occupation of the said land.

[59] Further, the terms make it even clearer that no beneficiary shall have any caveatable interest over the said land. If the beneficiaries do not have caveatable interest in the land, then they cannot grant any interest or rights to the plaintiffs. Hence, the terms make clear that the beneficiaries have no rights to grant any rights in respect of use and occupation of the said land, the beneficiaries have no right to enter into dealings or agreements without the prior approval of the Director of Lands and Surveys.

[60] In *Lean Shing Pek v. Anang Basang & Ors* [2013] 8 MLJ 899, the High Court in dismissing the plaintiff's claim held as follows:

> (3) The agreements between the defendants and the plaintiff were null and void as there was no rights capable of being the subject matter of a contract in the absence of an approval from the Lands and Surveys Department that the land had been approved at the time the alleged agreements were executed (see p. 8 (w)); *Shariff Basa SH Bakir v. Shariff Yunus SH Bakir & 2 Ors; Egin @ Laiwin bin Mahir & 481 Ors v. Corak Nahkoda Sdn Bhd & 4 Ors.*
>
> (4) The plaintiff's interests in the subject lands were not registered and the subject lands had been transferred and registered into the name of the 42nd defendant. Hence, the agreements between the plaintiff and the defendants, could not defeat the registered interest of the 42nd defendant who was the lawful and registered owner of the subject lands (see para 10(a) (b)).
>
> 8(m) I also find that the plaintiff did not adduce any evidence that the subject lands had been alienated to nor any approval from the Lands and Surveys Department that the subject lands had been approved to the first-41st defendants at the time when the said agreements were signed by the first-41st defendants;
>
> (n) I noted that even in the preamble and/or in the said agreements between the first - 41st defendants and the plaintiff, there was nothing in the said agreements, to state that there were any approval from the Lands and Surveys Department nor any approval reference was stated;

(o) I also find that there was also no evidence at all that the first-41st defendants had mad any application to the Lands and Surveys Department for the subject lands. The actual landowners are those named in the land titles at pp 1-248 of the PBD1. The evidence adduced showed that the applicants for the lands are not all the first-41st defendants;

[61] The plaintiffs did not fulfil and comply with the special terms in the title deed in entering the said JVA and logging agreement with the beneficiaries *ie*, to get approval from the Director of Lands and Surveys.

[62] Unless the special terms are complied with, the beneficiaries have no authority or capacity to enter into any dealing or contract in relation to the land. On the facts and evidence and having regard to the findings on preliminary issue no. 1 above, the beneficiaries have no authority, right or capacity to do any dealing with the land. In the premises, the court answers preliminary issue no. (ii) in the affirmative. From the agreed facts and undisputed evidence at the trial, the court finds that the special terms were not complied with.

Preliminary Issue No. (iii)

Are There Any Condition Precedents To The Joint Venture Agreement And The Logging Agreement Becoming Valid, Binding, Of Legal Effect And Enforceable? If So, Have The Condition Precedents Been Complied With?

[63] The defendants pleaded that the term of the title to the said land relating to the approval of the Director of Lands and Surveys for dealings by the beneficiaries and that 100% of the beneficiaries had to sign the JVA as conditions precedents.

Meaning Of The Term 'Condition'/'Condition Precedent'

[64] Conditional contracts and the meaning of the term 'condition' is dealt with in the book entitled *Law of Contract*, 4th edn by Dato' Seri Visu Sinnadurai as follows:

(i) it is important to draw a distinction between a condition that affects the formation of a contract and a condition that merely relates to an obligation or term of an already binding contract;

(ii) a condition which affects the formation of a contract of sale, as in a conditional contract, is therefore referred to as a contingent condition whereas one which relates to the performance of a term of a contract is described as a promissory condition. The Federal Court in *National Land Finance Co-Operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282; [1983] 1 MLJ 211 accepted this distinction; and

(iii) the distinction between these two was highlighted by Buckley LJ in *Eastham v. Leigh London And Provincial Properties Ltd* [1971] 1 Ch 871 where His Lordship observed:

> That is not, in my judgment, a condition precedent to the contract at all; it is part of the terms of the contract. You may call it a condition if you please, but it does not make it a condition precedent to the existence of a contract, it merely indicates what is part of the terms of the bargain, just as in all contracts for sale the terms of the bargain are customarily described as conditions of sales.

(iv) again Denning LJ in *Trans Trust SPRL v. Danubial Trading Co Ltd* [1952] 2 QB 297 said:

> Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation 'subject to the opening of a credit' is rather like a stipulation 'subject to contract'. If no credit is provided, there is no contract between the parties. In other cases a contract is concluded and the stipulation for a credit is a condition that is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit.

[65] The plaintiffs submit that in the present case, it is not a condition precedent that the prior approval of the Director of Lands and Surveys has to be obtained before the joint venture agreement and the logging agreement could be formed and are valid, subsisting and of legal effect and enforceable.

[66] The plaintiffs contend that the said approval of the Director of Lands and Surveys is a condition that merely relates to the obligation of the beneficiaries to apply to the Director of Lands and Surveys for approval to the dealings that were already entered into between the beneficiaries of the said land and the plaintiffs' that is the joint venture agreement and logging agreement.

[67] The plaintiffs submit that the plaintiffs did not plead in the amended statement of claim that the term that 100% of the beneficiaries of the said land had to sign the joint venture agreement before it becomes binding and of legal effect as a condition precedent.

[68] Further, the plaintiffs contend that the term that 100% of the beneficiaries must sign the joint venture agreement was not stated as a condition precedent therein nor it was a condition precedent required for the formation and validity of the JVA between the plaintiffs and the beneficiaries. It merely relates to an obligation or term of an already binding contract.

[69] In the Federal Court case of *Ho Kok Cheong Sdn Bhd & Anor v. Lim Kay Tiong & Ors* [1979] 1 LNS 29; [1979] 2 MLJ 224, Lee Hun Hoe CJ (Borneo) (as he was then) observed that:

> In the present case any talk about condition precedents or conditional contract is misleading. It is irrelevant and tends to cause confusion. The facts are clearly distinguishable from *Aberfoyle*'s case. There the contract was conditional on the vendor obtaining a renewal of certain leases. As the condition precedent was not satisfied there was no contract of sale; the relationship of vendor and purchaser was not created.

His Lordship then stated:

> … The question whether the contract is conditional or not depends entirely on the interpretation of the sale agreement. The "conditions" agreed by the parties were nothing more than the terms of the contract. The fact that a "condition" is a term of a contract does not make it a conditional contract. There are no condition precedent in the present case as understood in *Aberfoyle*'s case.

[70] Salleh Abas CJ (Malaya) in the Federal Court decision of *National Land Finance Co-Operative Society Ltd* (*supra*) said:

> … A contingent condition, as we have already referred it, is a provision in a contract to the effect that the contract shall not take effect unless and until the condition is fulfilled, and the non-fulfillment of the condition does not render either party liable in damages to the other; while a promissory condition, on the other hand, is an essential term of the contract, the breach of which entitles the innocent party to break itself as discharged from the contract and to sue for damages.

[71] The plaintiffs submit that it is clear that not every contract which is subject to a condition is a conditional contract. In the present case, the said term merely relates to an obligation or term of an already binding contract and breach of which entitles the innocent party to sue for damages based on a valid and binding contract.

[72] The Supreme Court held in the case of *Ng Siew Wah & Ors v. MAA Holdings Sdn Bhd & Anor* [1985] 1 LNS 37; [1985] 2 MLJ 332 that once the purchaser paid the balance of the purchase price and under cl. 3 and even though no application to Foreign Investment Committee (FIC) was made under cl. 2, the purchaser was entitled to specific performance:

> Thus, once full payment is effected, the vendors are committed to complete the sale irrespective of whether or not an application for FIC approval had been made and this is what is envisaged in clause 6 that if 'the vendors fail to comply with their obligations under this agreement to complete the sale, the purchaser shall be entitled to specific performance and all other legal remedies and damages available to them'.

[73] The plaintiffs submit that in our present case the permitted dealing in the said land was never refused nor rejected till date. Therefore, the joint venture agreement and logging agreement are NOT conditional agreements and are valid, subsisting and of legal effect and enforceable.

[74] The plaintiffs submit that this issue of condition precedents does not arise and there are no condition precedents to the joint venture agreement and logging agreement becoming valid, binding, of legal effect and enforceable.

[75] The defendants contend that a condition precedent to the joint venture agreement dated 23 May 2018 between the first plaintiff and the first defendant was that 100% of the beneficiaries of the land held under Communal Title Field Registry No. 154000683 had to sign the joint venture agreement before the joint venture agreement becomes binding and of legal effect.

[76] The joint venture agreement dated 23 May 2018 is not binding and of any legal effect because not 100% of the beneficiaries of the land held under Communal Title Field Registry No. 154000683 had signed the joint venture agreement.

[77] The logging agreement dated 23 May 2018 is not binding and of any legal effect because not 100% of the beneficiaries of the land held under Communal Title Field Registry No. 154000683 had signed the logging agreement.

[78] Both the joint venture agreement dated 23 May 2018 and the logging agreement dated 23 May 2018 are also not binding and of any legal effect because the trustee of the land held under Communal Title Field Registry No. 154000683 had not sign the agreements.

[79] When the plaintiffs filed their claim, they pleaded at para. 12 of the statement of claim:

> Pursuant to Clause 4 of the JV Agreement, the 1st Plaintiff avers that the 1st Defendant and the Beneficiaries knew or ought to have known that parties have agreed that the JV Agreement would be binding and of legal effect when all (100%) percent of the Beneficiaries have signed the said JV Agreement.

See: bundle of pleadings p. 13 para. 12 (encl. 220 at p. 13).

[80] Clause 4 of the joint venture agreement reads:

> **4. Anggapan Kesahan dan Penguatkuasaan Perjanjian**
>
> Benifisari-Benifisari dan TPSB bersetuju bahawa untuk melaksanakan Arahan Kabinet/Kerajaan Negeri berkaitan dengan Tanah tersebut dan untuk mematuhi peruntukan Seksyen 76 dalam Ordinan Tanah (Bab. 68 Sabah) bagi kebaikan kolektif kesemua BenifisariBenifisari, Perjanjian ini adalah dianggap sah dan berkuatkuasa sepenuhnya sekiranya seratus (100) peratus daripada Benifisari-Benifisari telah menandatangani Perjanjian ini sepertimana yang ditunjukkan dalam Jadual 1 yang dilampirkan Bersamasama dalam Perjanjian ini.

See: first defendant's bundle of p. 49 para. 4 (encl. 266 at p. 49).

[81] Even if the beneficiaries had rights and interests in the land as co-owners (which is denied, see also s. 11 of the Land Ordinance (Sabah) (Cap 68)), there is good reason why the plaintiffs required all the beneficiaries to sign the joint venture agreement. The joint venture agreement purports to give the first plaintiff the rights to enter and develop the land for agricultural purposes. Thus, for the first plaintiff to enter onto and develop the land, the first plaintiff would require the agreement of all the co-owners and hence, the reason cl. 4 exists in the joint venture agreement.

[82] An analogy can be drawn with a situation where there are ten co-owners of a parcel of land, and a company only signed an agreement with two of the co-owners. The company cannot be said to have acquired rights over the entire parcel of the land when the other eight co-owners have not signed the agreement.

[83] In the instant case, even if the beneficiaries have rights over the use and occupation of the land (which is denied in any event), all the beneficiaries must agree to grant such rights to the plaintiffs before they would acquire any such rights. This means that even if the beneficiaries can enter into agreements in respect of the land (which is denied), the plaintiffs cannot claim to have rights and interest to the land pursuant to the joint venture agreement and the logging agreement until and unless all the beneficiaries have actually signed the agreements (assuming the beneficiaries have such rights in the first place).

[84] It is not disputed that some of the beneficiaries did not sign the joint venture agreement or the logging agreement with the plaintiffs.

[85] It is noted that the logging agreement was purportedly entered into pursuant to the joint venture agreement: see Recital C of the logging agreement at p. 87 of the plaintiffs' bundle of documents 194 (encl. 222 at p. 87).

[86] The defendants contend that since the joint venture agreement has not been signed by all the beneficiaries, it cannot be binding or of legal effect. The logging agreement, having been signed by only some of the beneficiaries, is also not binding nor of any legal effect.

[87] It is an established principle of law that if a contract is a conditional contract, there is no contract to be completed unless and until the condition precedent is fulfilled: see *GPQ Sdn Bhd v. Constant View Sdn Bhd* [2017] 1 LNS 821; [2017] 6 MLJ 728 at 743.

[88] Recital D of the joint venture agreement reads:

> Pengarah Tanah dan Ukur Sabah telah memberikan kebenaran kepada Benifisari-Benifisari atau TPSB untuk memsuki, mengurus, mengusaha dan membangukan Kawasan Tanah Tersebut. Surat kebenaran tersebut Rujukan _____ disertakan dan dirujuk di sini sebagai "Lampiran B".

[89] In essence, Recital D of the joint venture agreement purports to refer to an existing approval by the Director of Lands and Surveys which is purportedly attached to the agreement but the date of the approval by the Director of Lands and Surveys is left blank and there is no Lampiran B attached. This clearly shows that the joint venture agreement is premised on the fact that as at the date of the joint venture agreement, approval had already been granted by the Director of Lands and Surveys. It is submitted that this shows that this approval is a condition precedent to the joint venture agreement becoming binding and of legal effect.

[90] The nature of an approval from the Director of Lands and Surveys show that such approval must be a condition precedent. As stated in the special terms of the title deed to the land itself:

> No dealings by the beneficiaries of their interest shall be recognised unless and until approved by the director of lands and surveys …

[91] The reference to dealings by the beneficiaries of their interest is referring to their beneficial interest. The special terms of the title deed also state:

> The beneficiaries shall at all times comply with the directions of the collector in relation to the use and occupation of the said land …

[92] It is not disputed that the Director of Lands and Surveys did not grant any approval in favour of the first plaintiff. Hence, the joint venture agreement is not binding or of any legal effect.

[93] Recital C of the logging agreement states that the logging agreement was entered into pursuant to the joint venture agreement. Since the joint venture agreement is not binding or of any legal effect, similarly the logging agreement is also not binding nor of any legal effect.

[94] Assuming that the beneficiaries have a right to enter into the joint venture agreement and the logging agreement in respect of the land in the first place (which is denied), there would be a condition precedent that all the beneficiaries have signed the agreements and further that the Director of Lands and Surveys had given approval for their entry into the agreements. This would have to be the case to be consistent with the plaintiffs' allegation that the beneficiaries do have the capacity to enter into contracts in respect of the land (which is denied).

[95] All the beneficiaries must have signed the agreements in order for the plaintiffs to have the alleged rights and alleged interests over the land by virtue of the joint venture agreement and the logging agreement. In other words, all the beneficiaries must have signed in order that the plaintiffs to have the full rights which they are alleging. Therefore, there is a condition precedent that all of the beneficiaries must have signed the agreements.

[96] Section 33(a) of the Contracts Act 1950 makes it abundantly clear that, where conditions precedents have not been fulfilled, contingent contracts cannot be enforced. A

[97] Hence the plaintiffs' claims, which are premised on the joint venture agreement and the logging agreement, are at best contingent contracts and are unenforceable. Therefore, the plaintiffs' claim ought to be struck out with costs. B

[98] The payment "wang ehsan" to the first defendant is not consideration but only a gift. This is stated at cl. 3(b) of the joint venture agreement which states *inter alia* "Wang ehsan tersebut merupakan pemberian ikhlas oleh TPSB dan dengan itu, ianya tidak akan diambil kira sebagai sebahagian daripada pembahagian dividen yang akan diterima oleh benifisiari-benifisiari. See: plaintiffs' bundle of documents at p. 47 (encl. 222 at p. 47). C

[99] At best, the agreements are conditional contracts. It is trite law that if a contract is a conditional contract, there is no contract to be completed unless and until the condition precedent is fulfilled: see for example, the Court of Appeal in *GPQ Sdn Bhd v. Constant View Sdn Bhd* [2017] 1 LNS 821; [2017] 6 MLJ 728 at 743. D

[100] In *National Land Finance Co-Operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282; [1983] 2 MLJ 211, the Federal Court was concerned with a contract of sale which was contingent upon the approval of the transaction by the Foreign Investment Committee. The Federal Court stated (at p. 289 (CLJ); p. 218 (MLJ)): E

> It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled. (See *Trans Trust SPRL v. Danubian Trading Co Ltd* [1952] 2 KB 297 304 – per Denning, LJ – and *Property and Bloodstock Ltd v. Emerton Bush v. Property and Bloodstock Ltd* [1967] 3 All ER 321 330 – per Sachs, LJ. Until the FIC approval was given liability for further performance remained unenforceable, *ie*, suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is in effect laid down by section 33(a) of the Contracts Act which enacts: F G H
>
> > 33(a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. I

[101] The conditions precedent to the joint venture agreement and the logging agreement includes the following:

(i) the obtaining of the approval of the fifth defendant to enter and to manage, operate and develop the said land;

(ii) the obtaining of the approval of the fifth and sixth defendants to enter into the joint venture agreement and the logging agreement; and

(iii) 100% of the beneficiaries having signed the joint venture agreement.

The undisputed facts and evidence shows that the above conditions precedent has not been fulfilled by the plaintiffs.

[102] Section 33 of the Contracts Act:

> Enforcement of contracts contingent on an event happening
>
> (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> (b) If the event becomes impossible, such contracts becomes void.

[103] In the case of *Gula Perak Bhd v. Datuk Lim Sue Beng & Other Appeals* [2019] 1 CLJ 153; [2018] MLJU 2107, the Federal Court as follows:

> [46] [iii] clause 2.1 (b) of the agreement had an express term to the effect that Gula Perak, as the vendor shall first obtain the approval of the Land Board before any transfer of the said land can be effected;
>
> [47] Reading the SPA as a whole, it is not dispute that the agreement was a conditional or contingent agreement, *ie*, conditional upon the approval being obtained from the Land Board for the transfer of the land. Being a conditional agreement it was not enforceable until all the the conditions have been fulfilled. If the conditions are not fulfilled then the said agreement would be no effect unless and until all the conditions are fulfilled.
>
> [48] … Until the approval of the Land Board was obtained and the pre-condition was then fulfilled, future performance under the agreement remained unenforceable. The SPA shall not take effect unless and until the condition is fulfilled when the Land Board's approval is obtained …
>
> [71] In the upshot, we hold the view that sub-s. 214A(1) of the NLC does prohibit a conditional agreement entered into between parties, so long as the general consensus between them was that no transfer of the said land was to be effected until the Land Board's approval was obtained. The said conditional agreement would not take effect unless and until the condition precedent was fulfilled.

[104] In the present case, there are conditional precedents for the JVA and logging agreements becoming valid, binding, of legal effect and enforceable *ie*, the approval from the Director of Lands and Surveys must be obtained first before the appointment of the plaintiffs as the contractors in the land.

Besides, it is also a conditional precedent that the JVA will only be enforceable, valid, binding and have legal effect if 100% of the beneficiaries signed the said JVA.

[105] The plaintiffs had failed to fulfil the conditional precedents contained in the JVA and logging agreements and therefore both JVA and logging agreements are invalid, not binding, has no legal effect and unenforceable and that s. 33 of the Contracts Act would apply.

[106] The other case relied by the defendants is the case of *Khatijah Abdullah & Ors v. Mohd Isa Biran* [2017] 7 CLJ 513; [2017] 2 MLJ 1. The Federal Court in its judgment held that the requirement for consent to transfer from the state authority was a condition precedent, which ought to be fulfilled before any transfer of the land was possible. Until fulfilled by the respondent, the SPA shall not take effect and the sale could not be completed. The SPA had become void and s. 33 of the Contracts Act 1950 would apply. A void contract did not generate any enforceable right or duty and where there was neither right nor duty, limitation could not be invoked.

[107] Based on the authorities cited above, as a result of the failure of the plaintiffs to fulfil the conditions precedents, the JVA and logging agreements shall not take effect and that both of the agreements shall not generate any enforceable right to the plaintiffs as claimed against the defendants.

Preliminary Issue No. (iv)

Are The Joint Venture Agreement And/Or The Logging Agreement Valid, Binding, Of Legal Effect And Enforceable?

[108] The plaintiffs repeat their submission hereinabove and submit that the joint venture agreement and logging agreement are valid, binding, of legal effect and enforceable.

[109] In *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1979] 1 LNS 96; [1980] 1 MLJ 21, the land was under a condition that it was agricultural land and the applicant was unsuccessful in their application to change the category of land use from agricultural to industry. The agricultural land was let for industrial purposes which is contrary to the condition on usage of the land. The Federal Court held:

> The tenancy agreement in this case was void and unenforceable. The appellants were aware of the illegality when they entered into the agreement and therefore section 66 of the Contracts Act, 1950, could not assist them.

[110] In *Toh Huat Khay v. Lim A Chang* [2010] 7 CLJ 261; [2010] 4 MLJ 312, the land title was endorsed with the following conditions that the said land could not be transferred within a period of ten years from the date of registration of the title and that after the period of ten years, the land could

only be transferred with the consent of the State Authority. The Director of Lands and Surveys purported to approve the transfer of the land to the defendant before the ten years period notwithstanding the said restriction in interest. The Federal Court held:

> (1) The said land, due to the said restriction in interest endorsed on the document of title pursuant to s. 124(1)(b) of the NLC, could not be transferred by TKC to the defendant unless TKC as the proprietor had, prior to the transfer, applied to the state authority for the striking off or the rescission of the said restriction in interest. The defendant had not shown that such an application was made by TKC. There was also no evidence to show that the state authority had directed that the said restriction in interest be struck off the document of title or that a note of its rescission be so indorsed on the document of title pursuant to s. 124(3) of the NLC.
>
> …
>
> (3) The transfer of the said land by TKC to the defendant was clearly in breach of the provisions of the NLC. The document of title had yet to be cleansed of the said restriction in interest and without the title being freed of such restriction in interest, the transfer of ownership was incapable of registration. That being the position, the registration of transfer of ownership to the defendant was not indefeasible since the registration thereof had been obtained by means of an insufficient or void instrument pursuant to s. 340(2)(b) of the NLC.

[111] In *CME Group Bhd v. Bellajade Sdn Bhd & Another Appeal* [2018] 10 CLJ 147; [2019] 1 MLJ 141, the express condition of use of the land in the land title was for residential purpose. However, pursuant to a tenancy agreement, the land was rented by the respondent to the appellant for commercial use in breach of the express condition of land use on the land title. The Federal Court (per Zulkifli Makinuddin PCA) held:

> (1) The tenancy for the commercial use of the lands, which in the instant matter was expressly conditioned only for residential use, was illegal and void. The COA erred in finding that the tenancy agreement was not unlawful because the state authority did not take any action against the owner of the lands for contravention of the condition pursuant to s. 128 of the NLC. Although no action was taken by the state authority in respect of the contravention, the tenancy agreement nonetheless remained illegal. The COA also erred in clothing the tenancy agreement with legality by reason of the issuance of the CFO by the DBKL. As rightly found by the High Court, the CFO had no bearing on the express condition of title to the lands.

[112] The above decisions by the appellate court shows that a tenancy agreement entered in breach of the express condition imposed on the land would render the tenancy agreement illegal and void. In addition to the agreement being declared illegal and void, the consequences of a breach or

default in the observance of any of the conditions of the land title would render the land or any portion thereof liable to forfeiture pursuant to s. 34 of the Sabah Land Ordinance. In *Egin & Ors v. Corak Nakhoda Sdn Bhd & Ors* [2009] 1 LNS 1516; [2009] MLJU 1448, the High Court (per Tuan Lee Heng Cheong JC, as His Lordship then was) held:

> 11. A perusal of the Form of Lease of the said Provisional Lease No. 096290676 would reveal that there are various express terms and conditions contained there and this is in addition to those terms and conditions imposed by the Sabah Land Ordinance. Based on the said Form of Lease, the 1st Defendant would have to pay the sum of RM9,030,270.00 to the 4th Defendant, as premium in addition to payment of the annual rent. In addition to the aforesaid the 1st Defendant will to comply with *inter alia* the stipulations that they must cultivate certain percentages of the said land by certain time period and that
>
> > the said land shall be cultivated, developed and maintained in accordance with good husbandry practice throughout the whole period of tenure of this title.
>
> 12. Further section 34(1) of the Sabah Land Ordinance states that as follows:
>
> > 34(1) In the absence of an express condition to the contrary in the document of title, there shall by virtue of this section be implied in every document of title the condition that in case of a breach or default in the observance of any of the conditions of the said title, whether expressed or implied by this Ordinance, or any previous land Ordinance, the Government may re-enter upon the land held thereunder and resume the whole or any portion thereof.
>
> 13. Thus I find that if the 1st Defendant is prevented from developing the said land in accordance with its planned phases and complying with other terms of the Provisional Lease and the Sabah Land Ordinance, there is a very real prospect that it will be delayed in meeting the time limitation placed on planting up the said land and complying with the relevant terms and conditions of the Provisional Lease which in turn will lead to the 1st Defendant being in breach of the terms and conditions indorsed on the Provisional Lease and the Sabah Land Ordinance thereby rendering the said land liable to forfeiture.

[113] Applying the above authorities to the present case, the court finds that the joint venture agreement and the logging agreement entered in contravention of the special terms in the title and is prohibited under s. 24(a), (b) and (e) of the Contracts Act 1950 which would render the said agreements illegal and void.

[114] In the light of the findings on preliminary issues no. (i), (ii) and (iii) and the above authorities, the court would answer preliminary issue no. (iv) in the negative.

Preliminary Issue No. (v)

If The Joint Venture Agreement And The Logging Agreement Are Not Valid Or Binding Or Enforceable And Of No Legal Effect, Do The Plaintiffs Have Any Cause Of Action Against The Defendants?

[115] The plaintiffs submit that the plaintiffs have a cause of action and claim against all the defendants as the joint venture agreement and logging agreement both dated 23 May 2018 are valid, binding, of legal effect and enforceable.

[116] The defendants contend that the plaintiffs' cause of action against the beneficiaries is based on breach of contract. If the agreements are not valid or binding or enforceable and of no legal effect, then there is no contract to be breached.

[117] The plaintiffs' cause of action against the second to seventh defendants is based on inducement to breach contract or unlawful interference with contract. This cause of action requires that the plaintiffs must have a lawful and/or valid contract which has been concluded. As stated in the findings on preliminary issues no. (i), (ii) and (iii) above, the plaintiffs do not have any valid or enforceable contract and the joint venture agreement and the logging agreement was tainted with illegality.

[118] In *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211; [1984] 2 MLJ 105 at 108, the Federal Court quoted *Grieg v. Insole* [1978] 1 WLR 302:

> At common law it constitutes a tort for a third person deliberately to interfere in the execution of a valid contract which has been concluded between two or more other parties, if five conditions are fulfilled.

[119] In *Network Pet Products (M) Sdn Bhd v. Royal Canin SAS & Anor* [2015] 2 CLJ 530; [2015] 4 MLJ 525, the appellant had alleged an oral partnership agreement. The Court of Appeal held that as the appellant failed to substantiate the existence of the alleged oral partnership agreement, the claims for conspiracy and unlawful interference with contract consequentially could not stand.

[120] Similarly in *In-Comix Food Industries Sdn Bhd v. A Clouet & Co (KL) Sdn Bhd* [1996] 2 BLJ 543; [1997] 4 MLJ 71 at 80, the court held that the plaintiff must prove the existence of an enforceable contract otherwise there is no case of interfering with contract or inducing breach of contract.

[121] In the present case, for the reasons given above, there is no valid or enforceable contract. Hence, the plaintiffs have no cause of action against the second to seventh defendants for inducing a breach of contract or interfering with contract. Having regard to the findings on preliminary issues no. (i) to (iv) above, neither does the plaintiffs have any cause of action against the first defendant. Thus, preliminary issue no. (v) is answered in the negative.

Conclusion

[122] Based on the aforesaid reasons and findings on preliminary issues no. (i) to (v), the plaintiffs' claim against the defendants is dismissed with costs in the sum of RM10,000 to each of the first and second defendants' and RM10,000 to the third to seventh defendants collectively to be paid by the plaintiffs subject to allocatur fee.